

Daniel Peñuela Cárdenas.

The Taxation of International Independent  
Personal Technical Services in Colombia.  
(Graduation Thesis)

Bogotá D.C. , Colombia.

2018.

Universidad Externado de Colombia.  
Facultad de Derecho.

Rector : Dr. Juan Carlos Henao Pérez.

Secretaria General : Dra. Marta Hinestroza Rey.

Director Departamento Fiscal : Dra. Olga Lucia Gonzalez Parra.

Presidente de Tesis: Dr. Cesar J. Sanchez Muñoz.

Director de Tesis: Dr. Jose Manuel Castro Arango.

Examinadores : Dr. Camilo Rodriguez

Dra. Maria Paula Baptiste

To Mom and Dad  
and specially to  
International Taxation  
that brought back  
the joy in law to my life.

## Table of Contents

List Of Abbreviation .....	2
Introduction .....	3
1. What is an <i>Independent Personal Technical Service</i> ? And why are they relevant to International Tax Law?.....	6
2. Tax treatment and definition of <i>Independent Personal Technical Service</i> : A discussion in between international law and internal law .....	11
3. A casuistic approach to the problem of <i>Independent Personal Technical Service</i> .....	
4. Propositions for a conscious and effective tax treatment of <i>Independent Personal         Technical Service</i> .	
5. The adequate path for <i>Independent Personal Technical Service</i> in context with its influence and problematics.	
Conclusion .....	39
Bibliography .....	40

## **LIST OF ABBREVIATIONS**

DTC	Double Tax Convention
IPTS	Independent Personal Technical Services
PE	Permanent Establishment
UN	United Nations
OECD	Organization for Economic Cooperation and development
WTO	World Trade Organization
GATS	General Agreement on Trade Services
VCLT	Vienna Convention on the Law of Treaties
MTC	Model Tax Convention
ICJ	International Court of Justice
ILC	International Law Commission
YBLIC	Yearbook International Law Commission
IBFD	International Bureau of Fiscal Documentation
CETM	Committee of Experts on International Cooperation in Tax Matters
CBS	Cross-Border Services

## Introduction.

The problems that International Tax Law faces nowadays have diversified and reached grounds that were once out of its scope. This change was produced by the exchange of goods and service in between countries and by the so called *globalization* in between some other factors.

Therefore International Tax Law cannot be static to those phenomena and it reacts becoming itself more specialized and close to reality creating new branches that reach different taxable events, prove of that are the efforts of Tax Administrations around the world to regulate conflictive and usually historically monopolized markets that have changed drastically, markets like public transportation, that have faced problems with the insertion of the Uber service, or the business of lodging people, as Airbnb has proven, and even the transfer of money which have moved itself from a bank-restricted operation to financial services not linked specifically with a bank with the participation of agents as Money Transfer, PayPal and some others.

On the other hand, the traditional distinction between goods and service has shrunk in a way that in order to spot its differences a much conscious study of the subject is needed. *Services* itself comprehends a vast amount of different activities that are of a noted relevancy and of most use in every day's commerce, services such as the international shipping of merchandise, services provided under any of the labor contract figures or services performed by entertainers and sportspersons among others.

In between those services there is one that will be the center of this work, the *Independent Personal Technical Services* (hereinafter IPTS) and the phenomena of the Cross-Border Services (hereinafter CBS) that can be easily defined as the stream of services in between people based in different countries, IPTS is problematic because its qualification and definition is rather confuse or in an instance vague and lacks the specialty in which such activities should be treated. For example, in the Model Tax Convention of the Organization for Economic Co-operation and Development (hereinafter OECD) or the Model Tax Convention of the United Nations (hereinafter UN), that are the two biggest guidelines used by countries around the world to negotiate their Tax Treaties, share difficulties that make the treatment of those services

incomplete and ambiguous (and to be more precise, the problem shared by both Models is the lack of consistency regarding each other, as one of them entitles *IPTS* with an article that treats its allocation independently (UN Tax Model) and the other treats it as an aggregate of Business Profits and other secondary norms (OECD Tax Model).

Due to that fact, there have been serious propositions with the intent of simplifying the provisions that apply under the Models in order to give legal certainty to taxpayers and tax administrations, whenever they face the duty of paying or levying the tax created by such activities.

Colombia has not been completely oblivious in this matter since the year 2012 there is an effort to regulate *IPTS* from a Tax in Income perspective (because for V.A.T purposes there are certain rules) as a result the Law 1607 of 2012 and consequently the Decree 3032

of 2013 have given some guidance regarding definitions<sup>1</sup> and other small issues, but this is far from being enough because the larger problem is to set out rules at an international level to allocate the rights to tax income created by CBS and where they fit in as to income qualification and treatment, as Prof. Dr. Brian J. Arnold have stated when talking about the importance of the taxation of *IPTS* in developing countries “*it is relatively easy for multinational enterprises to reduce the tax payable to a source country in respect of a group company resident and doing business in that country through payments for services rendered to that company by other non-resident group companies. The payments will generally be deductible in computing the income of the company resident in the source country but may not be taxable by the source country in the hands of the non-resident service provider*”<sup>2</sup>

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<sup>1</sup> Decree 3032 of 2013 English Translation “Art. 1: Definitions Technical service: technical service is considered activity, work or work provided directly by a natural person through a contract for the provision of personal services, for the use of applied knowledge through the exercise of an art, trade or technique, without transfer of said knowledge. The services provided in the exercise of a liberal profession are not considered technical services”. Original “Art: 1 Definiciones Servicio técnico: Se considera servicio técnico la actividad, labor o trabajo prestado directamente por una persona natural mediante contrato de prestación de servicios personales, para la utilización de conocimientos aplicados por medio del ejercicio de un arte, oficio o técnica, sin transferencia de dicho conocimiento.” Los servicios prestados en ejercicio de una profesión liberal no se consideran servicios técnicos.”

<sup>2</sup> Brian J. Arnold, *The Taxation of Income from Services under Tax Treaties: Cleaning Up the Mess. Bulletin for International Taxation*, 2011 (Volume 65), 2010 2013 pg. 3

IPTS and CBS are critical for Colombia, not only because of its relevance in international trade but also taking in consideration that currently Colombia have signed ten (13)<sup>3</sup> Tax Treaties with the aim to avoid Double Taxation and Double Non-Taxation, and it has undergoing negotiations with other countries, in those Treaties there is a confusing path in certain treaties IPTS are treated with an independent and others that treat IPTS with secondary norms or with a treatment that secludes the application of a primary rule to that tax event (Essentially all the others)

From this short introduction it could be said that Colombia in its International Agreements nor in its internal legislation have defined *IPTS* accordingly this work will address, first and foremost, the issue of what are *IPTS* following the definitions given by the Tax Models, the International Tax Treaties signed by Colombia, the references given by Colombia's internal law, this will be made with the intent of simplifying and compiling the information scattered among the relevant sources striving a common point of understanding that will ultimately determine the starting point of this work.

That will be followed by some case-law involving the application of the law in regards of IPTS and CBS.

There is however some advances set in place in the UN Committee of Experts on International Cooperation in Tax Matters and by the most relevant authors in the subject, which will be brought here to clarify the path of *IPTS and CBS* in the context of a globalized world and changing economies.

Lastly, there will be a proposition in whether Colombia should concentrate its further efforts in consolidating its treaties around an independent provision that treats exclusively the allocation of rights from income derived of *IPTS* or rather have a treatment trough other propositions not particularly dedicated to the subject will be concluded .

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<sup>3</sup>Retrieved from the page of the DIAN  
(<https://www.dian.gov.co/normatividad/convenios/Paginas/ConveniosTributariosInternacionales.aspx>).



## **1. What is an *Independent Personal Technical Service*? Why are they relevant to International Tax Law?**

The most relevant thing to do is to develop the general-basic frame of knowledge required to address the issues that the *IPTS* encounter when treated practically. It is not the objective to take all the sources treating *IPTS* in the same degree of relevance, because it will conclude in an individual study of every decree, law, treaty, convention that addresses *IPTS*.

Therefore, the sources that will serve as fundamental elements to build the *state of the art* of *IPTS* will be the Model Tax Conventions as they stand right now, the Tax Treaties signed by Colombia and Colombia's internal law.

Then in order to answer the question of "What are *IPTS*?" a broader question must be answered first and it is basically: What is a Service? But the exercise through which a definition is established must look primarily at to what is in the sources and the first step must be the Model Tax Conventions.

Within the UN Model there is Article 14 on Professional and Technical Services and the new Article 12A of Fees for technical Services, however neither of those articles bring up the definition of Service nor of *IPTS* the approximation to a definition therein is under the Article 14 that presents a short list of activities that could be considered of professional technical character<sup>4</sup> but even with a new Article 12A is difficult to find a definition underneath , and under the OECD Model in Article 3 of General Definitions<sup>5</sup>, there is a vague definition of service to treaty

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<sup>4</sup> " (...) The term "professional services" includes specially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants."

<sup>5</sup> Article 3 GENERAL DEFINITIONS

1. For the purposes of this Convention, unless the context otherwise requires:

- a) the term "person" includes an individual, a company and any other body of persons;
- b) the term "company" means any body corporate or any entity that is treated as a body corporate for tax purposes;
- c) the term "enterprise" applies to the carrying on of any business;
- d) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;

purposes aiming more to set it up under the category of Business however the content of such provision does not provide a definition for the term , and as Prof. J Arnold have stated I cite:

*“The provisions of the OECD and UN Models dealing with income from services were developed at a time when services, other than certain types of high-profile services, such as construction and entertainment, were not nearly as important in the global economy as other business activities, such as the development of natural resources, manufacturing and retailing Nevertheless, the provisions of the OECD and UN Models dealing with services have not been updated to reflect their increased importance. There is no definition in the UN or OECD Models of the word “services.”<sup>6</sup>*

As a result the rule of the law the second paragraph of Article 3 of both conventions must be taken into account , it reads as follows :

*“As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws*

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e) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise that has its place of effective management in a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;

f) the term "competent authority" means: (i) (in State A): ..... (ii) (in State B): .....

g) the term "national", in relation to a Contracting State, means: (i) any individual possessing the nationality or citizenship of that Contracting State; and (ii) any legal person, partnership or association deriving its status as such from the laws in force in that Contracting State;

h) the term "business" includes the performance of professional services and of other activities of an independent character.

2. As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

<sup>6</sup> *The Taxation of Income from Services under Tax Treaties: Cleaning Up the Mess.* Brian J. Arnold. December 2011 pg. 2

*of that State prevailing over a meaning given to the term under other laws of that State”<sup>7</sup>*

But under the Colombia’s Internal Law there has been certain difficulty to define the term as well it has not find a mutual agreement in between the doctrine, the case law and the legislator. The latest in some cases has been rather cautious with its approach, in Colombia and other countries have followed a thread of not giving a definition to the term and most of the times the legislator has chosen to give a sort of “catalogues” of what are considered services and what not because getting a unified definition of service is complicated. Other examples of this “catalogue definition” practice can be found in the legal system of France<sup>8</sup> and India<sup>9</sup>.

The “catalogue” approach is not inaccurate *per se* , there are as many Services as there are needs in the word and setting a definition of service flexible enough to serve as a starting point is difficult; just to illustrate the wide range of the issue the Department of Economic and Social Affairs, United Nations in its International Standard Industrial Classification of All Economic Activities Revision Four (4), listed one hundred (100) kinds of “*Economic Activities*”<sup>10</sup> ,that in other words are services , those categories at the same time are split into sub-categories, making services and exhausting yet incomplete list. Basically trying to set a simple definition for services would be a misappropriation of its general character and on the other hand if a definition is too specific it will be a sacrifice of its general character.

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<sup>7</sup> Department of Economic & Social Affairs. United Nations. *Model Double Taxation Convention between Developed and Developing Countries* United Nations, New York, 2017 pg. 32

<sup>8</sup> In the French Tax Code we encounter that there are practically no strict definitions for every type of revenue that will be part of the tax base of every tax payer, and from Section 2 of the First Chapter, it is clear that they start to break Industrial and Commercial Income in categories that enclose several types of Services in a catalogue kind of manner; Retrieved from [https://www.legifrance.gouv.fr/affichCode.do;jsessionid=F825DB4E68377869D66735FE3310C790.tplgfr21s\\_3?idSectionTA=LEGISCTA000006179571&cidTexte=LEGITEXT000006069577&dateTexte=20180127](https://www.legifrance.gouv.fr/affichCode.do;jsessionid=F825DB4E68377869D66735FE3310C790.tplgfr21s_3?idSectionTA=LEGISCTA000006179571&cidTexte=LEGITEXT000006069577&dateTexte=20180127)

<sup>9</sup> In India the system under which the tax payers pay and are taxed is called the Services Accounting Codes (SAC) under the which there are merely no general definitions but instead we find a catalogue of all the services and the Goods and Service Tax (GST) code that must be put by every tax payer when delivering invoices, paying taxes, etc; related with that services. Retrieved from ([http://centralexcisechennai.gov.in/ServiceTaxCommissionerate/E-Payment/services\\_and\\_their\\_accounting\\_codes.htm](http://centralexcisechennai.gov.in/ServiceTaxCommissionerate/E-Payment/services_and_their_accounting_codes.htm) )

<sup>10</sup> International Standard Industrial Classification of All Economic Activities Revision 4, Department of Economic and Social Affairs, United Nations, New York, 2008 pg. 1 (<https://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=27>)

Yet there are two definitions given by Colombia's Internal Law that deliver a general meaning that could work out for the purpose of this work and they are set in place under the Tax Law specifically the Decree 3032 of 2013 under its Article 1<sup>st</sup> Definitions , I cite :

*“Personal service: It is considered a personal service any activity, labor or work delivered directly by a natural person , that its itself materialized through an action a labor obligation, without considering if such activity is predominantly material or intellectual, and that generates a retribution weather in money or in species , independently of its name or form of remuneration.*

*(...)*

*Technical service: technical service is considered to be the activity, labor or work delivered directly by a natural person by means of contract of provision of personal services, for the utilization of knowledge applied by means of the exercise of an art, trade or skill, without transfer of the above mentioned knowledge. The services given in exercise of a liberal profession are not considered to be technical services.”<sup>11</sup>*

Nonetheless in a still possible situation where a definition through the Internal Law could not be found the question will turn an interpretation manner that must be took with the guide of the Vienna Convention on The Law of Treaties, specifically in its Article 31 General Rule of Interpretation as follows :

*“Article 31, GENERAL RULE OF INTERPRETATION 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>12</sup>*

According a definition of service by manner of good faith and its common understanding differently than going a Dictionary will be simply contradictory ; consequently under the

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<sup>11</sup> Decree 3032 of 2013 pp 2, Retrieved in (<http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=56251>)

<sup>12</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155 , pp 340.

Merriam-Webster Dictionary the term service reads as follows “a: the occupation or function of serving in active service b: employment as a servant entered his service”<sup>13</sup>. In that sense a Service is the act of serving, or rendering a work to someone, some other definitions focus on the act of assistance<sup>14</sup> and some other in the difference between *goods* and services<sup>15</sup>. For instance the definition of service in the Black’s Law Dictionary treats it as “duty or labor to be rendered by one person to another”<sup>16</sup> which does not go so far away from the common understanding of the word; Prof. Arnold have himself an interpretation that better suits the interest of this work, cite:

*“The Oxford English Dictionary defines service broadly as “the action of helping or doing work for someone”. This definition is inappropriately broad for purposes of tax treaties because it includes voluntary or charitable services. The definition in Black’s Law Dictionary is, therefore, perhaps more appropriate, i.e. “the act of doing something useful for a person or company for a fee”*

Therefore, the definition of service will be that of the Black’s Law Dictionary, taking into consideration that the Black’s Law Dictionary have been used in several case law to clarify terms of all sorts<sup>17</sup> under a perspective of international law and even in Colombia the tax administration or the DIAN have used ,if not the same, the Dictionary of the Royal Academy of the Spanish Language to give definitions or approximations to concepts such as the Technical Assistance or just Technical<sup>18</sup>.

The next question to be treated must be of what kind of services there are and if they are equally treated before the law.

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<sup>13</sup>Service. 2018. In Merriam-Webster.com. Retrieved February 9, 2018, from (<https://www.merriam-webster.com/dictionary/service>)

<sup>14</sup>Service. 2018 In The Oxford English Dictionary. Retrieved February 9, 2018, from (<https://en.oxforddictionaries.com/definition/service>)

<sup>15</sup>Service. 2018 In The Business Dictionary. Retrieved February 9, 2018, (<http://www.businessdictionary.com/definition/services.html>)

<sup>16</sup> Service. 2018 In The Black’s Law Dictionary . Retrieved February 9 2018, (<http://thelawdictionary.org/service/>)

<sup>17</sup> In Colombia there is a precedent in the Supreme Court of Justice in the decision No 1100102030002007-01956-00 of the 27<sup>th</sup> July of 2011.

<sup>18</sup> Concepto 31929 de 05 de Noviembre de 2015 Dirección de Impuestos y Aduanas Nacionales. pg. 3 .

What are the differences in between services? The doctrine and the legislator have not deal with a way to differentiate services in general categories and as its case with the term services it does not there is not a way to differentiate it within the Models nor in Colombia's internal law , meaning that there is no such thing as defining factors or characteristics that put one service under one category and other under a different one.

The approach must be then to go to another set of sources, given the fact that it could not be extracted through good faith neither a common knowledge of the term following the Vienna Convention , accordingly anyone could say that there are differences in the world of services that are evident and inevitable such as the differences in between public and non-public services which will axis on who is performing or offering the service, also there are differences in between services that are performed to individuals or for individuals and others.

But other than those extremely simple differences, there is not a step by step guide as to what gives its distinguishable factor to each service nor there is one for the way to define and classify IPTS.

However, the subject of services and its qualification have been treated by the World Trade Organization<sup>19</sup> (hereinafter WTO) and the UN<sup>20</sup> not under the same terms and even though they do not provide a guideline under which someone could determine the defining factors to qualify services it does make a list or catalogue in of services that share some qualities.

As stated in the International Standard Industrial Classification of All Economic Activities Revision 4 (Hereinafter ISIC Rev 4) made by the Department of Economic and Social Affairs of the UN:

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<sup>19</sup> *With the development of initiatives such as the General Agreement on the Trade In Services. World Trade Organization, 1995, Uruguay.*

<sup>20</sup> *With the development of initiatives such International Standard Industrial Classification of All Economic*

*“Classifications are, so to speak, the system of languages used in communication about, (...) of, the phenomena concerned. They divide the universe of statistical data into categories that are as homogeneous as possible with respect to those characteristics that are the objects of the statistics in question.”*<sup>21</sup>

Therefore the question is what makes the services under the classification of the ISIC Rev 4 by the UN and the General Agreement on Trade Services (hereinafter GATS) made by the WTO homogenous in a sort that they can be grouped under an specific kind of service?

However the study must be narrowed to what makes a service in the ISIC Rev 4 fit under section M. there are *Professional, Scientific and Technical activities*? They are defined as follows *“This section includes specialized professional, scientific and technical activities. These activities require a high degree of training, and make specialized knowledge and skills available to users.”*<sup>22</sup> Some characteristics of “technicity” can be extracted from that statement alone; characteristics that serve to answer the question of what are technical and non-technical services.

Before that, under the GATS there are another set of characteristics:

*“With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.”*<sup>23</sup>.

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<sup>21</sup>International Standard Industrial Classification of All Economic Activities Revision 4, Department of Economic and Social Affairs, United Nations, New York, 2008 pg. 9

<sup>22</sup>International Standard Industrial Classification of All Economic Activities Revision 4, Department of Economic and Social Affairs, United Nations, New York, 2008 pg. 224.

<sup>23</sup> The General Agreement on the Trade In Services. World Trade Organization, 1995, Uruguay. Article 6 pg. 8.

Taking these two approximations the are characteristics that seem essential to clarify the technical in services, (i) as that it must be a service or activity that must be rendered with a certain quality, that require a high degree of training, (ii) that they must be based in competence and (iii) in the ability to supply and the fact of making specialized knowledge and skills available to users.

In the lack of guidance under how to classify services whether they are technical or non-technical, the characteristics of *technicity* can be somehow delimited and exemplified, for instance the service provided by a delivery boy shifts away greatly from the service provided by a financial consultant, in terms of quality and type of service and also in the kind of expertise required to the get the knowledge to perform one service and the other, it is easy to reduce its difference to a matter of quality, the degree of practice and training and the share of knowledge towards the users.

The closure question for this chapter is why is that relevant? is because Technical Services (and specially some instead of others, such as services provided by Artists and Sportspersons, Directors and Top Managerial Officers those that involve shipping, whether inter-land by waterway transport or by air transport, services provided under an employment relationship and IPTS) have had a major role in International Tax Law and have a distinguish place in the MTC of the UN and the OECD, and that represents the concern of those organizations to properly and allocate the right to tax those activities where they belong, that is why some sort of taxation on IPTS is essential in a country where foreign investment is key.

## **2. Tax treatment and definition of *Independent Personal Technical Service*: A discussion in between international law and internal law.**

Trade in services have become a major commodity in today's world and the so called second wave of globalization brought up specialized services to the spotlight in terms of international



trade<sup>24</sup>, in recent years in Colombia the percentage of GDP that exports of goods and services held was about 12% when compared to the US percentage which was 14%<sup>25</sup> it shows that the trade of services constitutes a relevant and important factor in economics. The problem here is to delimitate ITPS, Technical Service have been already delimited and as a logical conclusion independent and personal characteristic of the term have to be clarified.

Independent under a Tax Law Perspective would be any activity that it is performed without the direct subordination of another subject, made outside of a labor or employment relationship following an interpretation under Article 15 of Both the UN and OECD Models<sup>26</sup>.

And lastly regarding its Personal character, it is to be mentioned that it refers to an activity perform by one of the parties that can, following the definition contained in the Both MTC in Article 3 Definitions, for “Person” it should be interpreted as an “individual, a company and any other body of persons”<sup>27</sup>, in the relationship entirely by himself and/or taking full accountability of its result or execution.

There are two MTCs that are used worldwide when countries decide to take upon negotiations to determinate the allocation of tax rights, although the Models themselves are not legally binding, its language and technical definitions are often taken into account (most of the times without being changed at all) in the final text of the DTCs, that explains why studying them in their “original” form aims to unveil the meaning behind its wording and organization.

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<sup>24</sup> *The composition of FDI has also changed significantly. In 1914, 55% of the FDI stock was in the primary product sector, 20% in railroads, 15% in manufacturing, and only 10% in distribution, utilities, banking, etc. (Dunning 1983:89). In the late 1990s, the figures look quite different. In the EU, 63% of FDI went to services, 31% to manufactures and only 6% to the primary sector (European Commission, 1996:90). UNCTAD (1997:35) shows that only about 20% of the assets of the top 100 MNCs are in the petroleum and mining sectors. Two waves of Globalization Superficia (Richard E. Baldwin, 1999)l Simmilarities Fundamental Differences Richard E Baldwin Philipe Martin pg. 19.*

<sup>25</sup> Retrieved from , on March 10<sup>th</sup> 2018, : ([http://atlas.media.mit.edu/en/profile/country/col/#Trade\\_Balance](http://atlas.media.mit.edu/en/profile/country/col/#Trade_Balance)) and also from : (<http://data.worldbank.org/indicator/NE.EXP.GNFS.ZS?locations=CO-US>)

<sup>26</sup> *There is a clear distinction in whether a relation in between the parties is subdue under a labor contract or a relationship outside of it.*

<sup>27</sup> *See reference 11*

Historically the IPTS had been treated under Article 14 of both models but with the erasure of Article 14 in April 2000 of the OECD Model the treatment and definition itself of IPTS have changed greatly both models and their commentaries will be studied in order to give a structure of what is found in the Models.

In the first place the UN Model does treat the IPTS with an independent article that allocates the right to tax that income under certain threshold but before that a look into the article itself :

*“Article 14 Independent Personal Services*

1. *“Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State except in the following circumstances, when such income may also be taxed in the other Contracting State:*

*(a) If he has a fixed base regularly available to him in the other Contracting State for the purpose of performing his activities; in that case, only so much of the income as is attributable to that fixed base may be taxed in that other Contracting State; or*

*(b) If his stay in the other Contracting State is for a period or periods amounting to or exceeding in the aggregate 183 days in any twelve- month period commencing or ending in the fiscal year concerned; in that case, only so much of the income as is derived from his activities performed in that other State may be taxed in that other State.*

2. *The term “professional services” includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.”<sup>28</sup>*

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<sup>28</sup> Department of Economic & Social Affairs. United Nations. *Model Double Taxation Convention between Developed and Developing Countries* United Nations, New York, 2017 pg. 32

There are references to IPTS also contained in article 6, article 10, article 11, article 12 and article 22, but they are not substantial to our study at this point.

Then Article 14 presents the basis of IPTS, to begin with it dictates that income derived by the exercise of IPTS should be liable to tax in the Residence State, but if that income is perceived by a fixed base or by a person that has been for the aggregate of 183 days in the Source State, it will be the latest and not the former who would have the rights to tax that income; also in its last paragraph Article 14 provides a couple of examples that would be framed as IPTS this short list provides services that would fall in with the characteristics declared as particular to what technical is.

On the other hand, there are some paragraphs under the commentaries to take into consideration when studying the IPTS, for example paragraph 9. :

*“The former Group of experts discussed the relationship between Article 14 and subparagraph 3(b) of Article 5. It was generally agreed that remuneration paid directly to an individual for the performance of activity in an independent capacity was subject to the provisions of Article 14. Payments to an enterprise in respect of the furnishing by that enterprise of the activities of employees or other personnel are subject to Articles 5 and 7. The remuneration paid by the enterprise to the individual who performed the activities is subject either to Article 14 (if he is an independent contractor engaged by the enterprise to perform the activities) or Article 15 (if he is an employee of the enterprise). If the parties believe that further clarification of the relationship between Article 14 and Articles 5 and 7 is needed, they may make such clarification in the course of negotiations.”*<sup>29</sup>

This paragraph aims to differentiate two situations and to make clear that the character of independent activity should be tied up with the income perceived by an individual performing as such and not to companies furnishing services through their employees or subordinates, because that situations is addressed in Article 5 subparagraph 3(b)

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<sup>29</sup> Ibid pg. 239.

Given the fact that article 14 of both UN and OECD MTCs were essentially the same<sup>30</sup>, the commentary reproduces entirely the former commentary of the OECD to the now deleted article 14 of the OECD MTC and it introduce it this way (the most relevant information on the commentary will be taken in order to avoid any unnecessary data):

*“Since Article 14 of the United Nations Model Convention contains all the essential provisions of Article 14 of the 1997 OECD Model Convention, the former OECD Commentary on that Article is relevant. That Commentary reads as follows:*

*1. The Article is concerned with what are commonly known as professional services and with other activities of an independent character. This excludes industrial and commercial activities and also professional services performed in employment, e.g. a physician serving as a medical officer in a factory. It should, however, be observed that the Article does not concern independent activities of artistes and sportsmen, these being covered by Article 17.*

*2. The meaning of the term “professional services” is illustrated by some examples of typical liberal professions. The enumeration has an explanatory character only and is not exhaustive. Difficulties of interpretation which might arise in special cases may be solved by mutual agreement between the competent authorities of the Contracting States concerned.*

*3. The provisions of the Article are similar to those for business profits and rest in fact on the same principles as those of Article 7. The provisions of Article 7 and the Commentary thereon could therefore be used as guidance for interpreting and applying Article 14. Thus, the principles laid down in Article 7 for instance as*

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<sup>30</sup> Art. 14 OECD Model Tax Convention

[Deleted from the Model Tax Convention on 29 April 2000]

*1. Income derived by a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State for the purpose of performing his activities. If he has such a fixed base, the income may be taxed in the other State but only so much of it as is attributable to that fixed base.*

*2. The term "professional services" includes especially independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.]*

*regards allocation of profits between head office and permanent establishment could be applied also in apportioning income between the State of residence of a person performing independent personal services and the State where such services are performed from a fixed base. Equally, expenses incurred for the purposes of a fixed base, including executive and general expenses, should be allowed as deductions in determining the income attributable to a fixed base in the same way as such expenses incurred for the purposes of a permanent establishment (...). Also in other respects Article 7 and the Commentary thereon could be of assistance for the interpretation of Article 14, e.g. in determining whether computer software payments should be classified as commercial income within Article 7 or 14 or as royalties within Article 12.*

*4. Even if Articles 7 and 14 are based on the same principles, it was thought that the concept of permanent establishment should be reserved for commercial and industrial activities. The term “fixed base” has therefore been used. It has not been thought appropriate to try to define it, but it would cover, for instance, a physician’s consulting room or the office of an architect or a lawyer. A person performing independent personal services would probably not as a rule have premises of this kind in any other State than of his residence. But if there is in another State a center of activity of a fixed or a permanent character, then that State should be entitled to tax the person’s activities.”<sup>31</sup>*

The information on these paragraphs gives a lead on the intended treatment envisioned by the OECD, it is conflictive that such information is now only reachable through the commentary of the Article 14 of the UN Model and not the Article 14 of the OECD Model, in its paragraph 1 and 2 it illustrate the independent character of the activities compromised in the article and it does a reference to liberal professions which are services that fits as IPTS; In paragraph 3 and 4 a reference to Article 7 can be found in the extent of that even though the articles are based under the same principles, the term Fixed Base was hard to define and could be hard to differentiate from the already consolidated term of Permanent Establishment (hereinafter PE).

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<sup>31</sup>*Ibid* pg. 240.

Not only that in the latest update of the UN Model that was published in May 2018, implemented one key advance to technical service as a whole which is the Article 12A, that even if it does not directly treat ITPS it does treat Fees for Technical Services in a way that has no precedent it reads as follows :

*Article 12A Fees for Technical Services:*

*1. Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*

*2. However, notwithstanding the provisions of Article 14 and subject to the provisions of Articles 8, 16 and 17, fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed \_\_\_\_ percent of the gross amount of the fees [the percentage to be established through bilateral negotiations].*

*3. The term “fees for technical services” as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made:*

*(a) to an employee of the person making the payment;*

*(b) for teaching in an educational institution or for teaching by an educational institution; or*

*(c) by an individual for services for the personal use of an individual.*

*4. The provision of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment situated in that other State, or performs*

*in the other Contracting State independent personal services from a fixed base situated in that other State, and the fees for technical services are effectively connected with:*

- (a) such permanent establishment or fixed base, or*
- (b) business activities referred to in (c) of paragraph 1 of Article 7.*

*In such cases the provisions of Article 7 or Article 14, as the case may be, shall apply.*

*5. For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the fees was incurred, and such fees are borne by the permanent establishment or fixed base.*

*6. For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State through a permanent establishment situated in that other State or performs independent personal services through a fixed base situated in that other State and such fees are borne by that permanent establishment or fixed base.*

*7. Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other person, the amount of the fees, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess*

*part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.”<sup>32</sup>*

The innovation of this article is a step forward in the aid of countries under its bilateral negotiations because it brings specifically a paragraph that illustrates what technical services cover as it is with the expression “*consideration for any service of a managerial, technical or consultancy nature*”. Even if finally we have somehow an “indication” more of a definition under services that could be described as “technical services” it is insufficient.

In conclusion, the UN Model takes an approach that could appear more detailed than its counterpart

On the other hand, the OECD Model as mentioned before does not have an Article 14, therefore provisions dealing with IPTS have been spread out in different articles, the most relevant being Article 3, Article 5 and Article 7 respectively.

In place of Article 14 and its commentaries under the OECD Model this text is found in its place:

“Article 14 was deleted from the Model Tax Convention on 29 April 2000 on the basis of the report entitled “Issues Related to Article 14 of the OECD Model Tax Convention” (adopted by the Committee on Fiscal Affairs on 27 January 2000 and reproduced in Volume II of the full-length version of the Model Tax Convention at page R(16)-1). That decision reflected the fact that there were no intended differences between the concepts of permanent establishment, as used in Article 7, and fixed base, as used in Article 14, or between how profits were computed and tax was calculated according to which of Article 7 or 14 applied. In addition, it was not always clear which activities fell within Article 14 as opposed to Article 7. The effect of the deletion of Article 14 is that income derived from professional services or other activities of an independent character is now dealt with under

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<sup>32</sup> *Ibid* pg. 28.



Article 7 as business profits.”<sup>33</sup>

Inevitably the deletion of article 14 responds to a simple logic used by the OECD at the time, that IPTS could fit in the category in Business Profits, but that would have served to fit all the other categories of services in it, which at first sight corresponds to a lazy and rushed treatment.

First Article 5 treats the subject of the PE if not entirely needed to the subject of IPTS some of its paragraphs are directly related to the subject here studied:

" Article 5 PERMANENT ESTABLISHMENT

1. For the purposes of this Convention, the term “permanent establishment” means a fixed place of business through which the business of an enterprise is wholly or partly carried on.”

This is where the concept of fixed base retained in the Article 14 is intended to be under an OECD approach.

As for the rest, the OECD decided that IPTS should be treated as Business Profits with a provision under Article 7, nonetheless the treatment of IPTS under Article 7 is only possible with the underlying condition that professional, technical and any other independent services, have to be treated as “Business” and this is achieved with an extension of a definition under Article 3 as follows:

“Article 3 GENERAL DEFINITIONS 1. For the purposes of this Convention, unless the context otherwise requires:

(...)

- c) the term “enterprise”<sup>34</sup> applies to the carrying on of any business;

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<sup>33</sup> *Ibid* pg. 240

<sup>34</sup> *Ibid* pg. 78.

4. *The question whether an activity is performed within an enterprise or is deemed to constitute in itself an enterprise has always been interpreted according to the provisions of the domestic laws of the Contracting States. No exhaustive definition of the term “enterprise” has therefore been attempted in this Article. However, it is*

d) the terms “enterprise of a Contracting State” and “enterprise of the other Contracting State” mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;

(...)

h) the term “business” includes the performance of professional services and of other activities of an independent character.”

The previous leads to the application of Article 7 application, presented in its first paragraph:

“Article 7 BUSINESS PROFITS

1. Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a PE situated therein. If the enterprise carries on business as aforesaid, the profits that are attributable to the PE in accordance with the provisions of paragraph 2 may be taxed in that other State.”

Those definitions are not considered “hard law” and can be mutually changed, excluded or re-engineered in the fittest way to the parties.<sup>35</sup>

In brief the OECD Model, prefers an approach to IPTS through diverse provisions being the most important first the Article 3 as it integrates the Professional and Independent services as Business and consequently anyone that performs them constitute an Enterprise, making Article 7 applicable, following a reading under the commentaries.

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*provided that the term “enterprise” applies to the carrying on of any business. Since the term “business” is expressly defined to include the performance of professional services and of other activities of an independent character, this clarifies that the performance of professional services or other activities of an independent character must be considered to constitute an enterprise, regardless of the meaning of that term under domestic law. States which consider that such clarification is unnecessary are free to omit the definition of the term “enterprise” from their bilateral conventions.”*

<sup>35</sup>Department of Economic & Social Affairs United Nations Model Double Taxation Convention between Developed and Developing Countries . United Nations, New York, 2011 pg. 81.

The two approaches treated in this chapter prove themselves lazy to say the least and when encountered in case law insufficient, however is to be retained that the efforts of the UN model are a suitable approach to the subject of IPTS, but it lacks precision in the definition of the IPTS and more importantly the issue of allocating tax rights under a proposition that takes into consideration the importance of IPTS,

On the other hand the OECD Model gives leverage to parties in the discussion of what can be considered Business Profits but this gives an unnecessary uncertainty to what are IPTS and this can be easily overlooked by the parties believing that it is not as important.

In the other hand , the situation in Colombia is rather difficult because there are 13 DTCs signed and 9 approved by Colombia's authorities and they do not hold the same consistency simply put there are 2 types of conventions : those that follow an UN approach pre 2017 updates and those with an OECD approach.

Under a somewhat UN, prior 2017, approach there are Chile, India, Portugal, these 3 countries have signed agreements with Colombia that took a treatment of IPTS in an independent way with Article 14, however it must be noted that even if those DTCs have this article for IPTS in Article 12 Royalties there are activities in paragraph such as "technical assistance, technical service and managerial activities" that under a simple read of the article will be integrated under Royalties.

The DTCs following an OECD approach are the majority as long as Spain, Canada, the Republic of South Korea, Czech Republic, Italy , France, the United Kingdom, Japan and the United Arab Emirates, these last four being the most recent DTC signed by Colombia yet to be approved, have been guided by an OECD Model, which gives the treatment of the IPTS to Article 7 but not only that they seemed to follow, maybe intentionally, the new propositions of the UN Model 2017, because they normally implemented fees for "*any service of a managerial, technical or consultancy nature*" under article 12, however this advance is seemingly disappearing in despite of the new UN Model, as it is the case with the yet-to-be approved DTCs with France the UK, Japan and the United Arab Emirates, that completely erase the mention of such services under the royalties article.

Mexico has a “*sui generis*” treatment because even if it does not follow the same wording as the OECD Model, it does indeed follow its principles and treatment, because the definition of *business* has within its scope the professional services provided in an independent manner but what makes different this DTC is that under the rules of the PE they deemed right to bring a concept from the original Article 14, as it is that a professional or independent service performed for more than 183 days in any of the countries constitutes a PE.

It seems then that Colombian negotiators have not had a unified approach when dealing with IPTS, this could result problematic when looking at complex organizational schemes of large companies.

Furthermore Colombia’s treaties ,all of them essentially<sup>36</sup>, poses its own problems because as they stand right now the incorporation of technical services under Article 12 dealing with Royalties have a problematic that is not encountered in the Models, normally Royalties and the Models as a whole give the residence state a large part of the taxing rights of such income, but Colombia has signed and approved most of its treaties with an inclusion of a clause allowing the levy of tax of such income by the source state following the internal legislation of that state, but not only that Colombia under the protocols of such treaties have add a clause commonly known as a Clause of Most Favored Nation which could very easily overturned in favor of a the new Article 12A regarding fees for technical service that will pretty much indeed strip or pose another set of problematics with Article 12 particular way of allocating rights.

Not merely but also, Colombia’s internal legislation pose its own problems as well, first it will be where to correctly categorize IPTS because they are integrated by a diverse sort of activities, a place to begin with is the classification of services provided by the Chamber of Industry of Commerce commonly known as the Code “CIU” which are nothing different that the ISIC Rev. 4 provided by the UN, secondly there is the Colombian Tax Code or the “Estatuto Tributario” , and its interpretation by the Colombian tax authority or the “DIAN” and lastly there will be references to the latest Laws that have touched IPTS in some extent.

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<sup>36</sup> Retrieved from the page of the DIAN  
(<https://www.dian.gov.co/normatividad/convenios/Paginas/ConveniosTributariosInternacionales.aspx>).

The code “CIIU” sets the category of IPTS under section “M” entitled precisely “Professional, scientific and technical activities”<sup>37</sup> under it there is a catalogue of activities, notably “accountability and legal Activities, activities of management consultancy, engineering and architectural activities, scientific research and development, marketing and publicity, the professional, scientific and technical activities and lastly veterinarian activities”; the code “CIIU” does not bring itself a way to tax activities, it just merely instruct companies and regular merchants into what kind of activity they are exercising.

There has been a recurring issue when defining Technical Assistance and Technical Service in Colombia and so far, this is what has been set in place by the “DIAN” and precisely the State Council that have state<sup>38</sup> :

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<sup>37</sup> *Clasificación industrial internacional uniforme de todas las actividades económicas Revisión 4 adaptada para Colombia CIIU Rev. 4 A.C. Section M pg 398.*

<sup>38</sup> *Concepto 31929 de 05 de noviembre de 2015. Dirección de Impuestos y Aduanas Nacionales en la página 3 en la cual se citó el Auto del Consejo de Estado del 26 de julio de 1984 Expediente 0154.*

“No es tan obvia, como lo afirma el demandante, la diferencia entre la noción de -servicios técnicos- y -servicios de asistencia técnica- (...) Los efectos fiscales no es lo mismo la -asistencia técnica-, que los -servicios técnicos- pues la primera se supone que se caracteriza por la transmisión de conocimientos a terceros y la segunda comprende tan solo la aplicación directa de la técnica por un operario sin transmisión de conocimientos”

“It is not so obvious as the applicant states, the difference between the concept of – technical services- and – services of technical assistance- (...) The fiscal outcome is not the same the – technical assistance- than the –technical service-, because the first it is supposed to be characterized by the transfer of knowledge to a third party and the second understand just the application directly by a technical operator without the transfer of knowledge of any kind”

And lately a definition given by the Decree 3032 of 2013 in its first article, that was already cited above in the work, that read as follows I cite:

**“Servicio técnico:** Se considera servicio técnico la actividad, labor o trabajo prestado directamente por una persona natural mediante contrato de prestación de servicios personales, para la utilización de conocimientos aplicados por medio del ejercicio de un arte, oficio o técnica, sin transferencia de dicho conocimiento. Los servicios prestados en ejercicio de una profesión liberal no se consideran servicios técnicos.”<sup>39</sup>

**“Technical service:** The technical service is considered to be the activity, work or work provided directly by a natural person through a contract for the provision of personal services, for the use of applied knowledge through the exercise of an art, craft or technique, without transfer of said knowledge. Services rendered in the exercise of a liberal profession are not considered technical services.”

Before moving forward few words on the way Colombia’s tax income, first it uses a Territorial Income approach meaning, roughly, that Colombia taxes businesses on only income earned within a country's borders, second the taxation of IPTS in Colombia from an Income perspective, should be set under the rule in Article 408 of the Tax Code, which reads as follows:

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<sup>39</sup> Decree 3032 of 2013 pp 2, Retrieved in (<http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=56251>)

“En los casos de pagos o abonos en cuenta por concepto de intereses, comisiones, honorarios, regalías, arrendamientos, compensaciones por servicios personales, o explotación de toda especie de propiedad industrial o del know-how, prestación de servicios técnicos o de asistencia técnica, beneficios o regalías provenientes de la propiedad literaria, artística y científica, la tarifa de retención será del quince por ciento (15%) del valor nominal del pago o abono.

Los pagos o abonos en cuenta por concepto de consultorías, servicios técnicos y de asistencia técnica, prestados por personas no residentes o no domiciliadas en Colombia, están sujetos a retención en la fuente a la tarifa única del quince por ciento (15%), a título de impuestos de renta, bien sea que se presten en el país o desde el exterior.”

“In the case of payments or payments in account for interest, commissions, fees, royalties, leases, compensation for personal services, or exploitation of any kind of industrial property or know-how, provision of technical services or technical assistance, benefits or royalties from literary, artistic and scientific property, the retention rate will be fifteen percent (15%) of the nominal value of the payment or credit.

Payments or payments in account for consulting services, technical services and technical assistance, provided by non-residents or not domiciled in Colombia, are subject to withholding at the single rate of fifteen percent (15%), at title of income taxes, whether they are provided in the country or from abroad.”

Those are the basics of Colombia’s approach to IPTS , however there is not a lead as to how allocating rights when complex international situations occurs and when regarding some procedures set in place by Colombia’s entities<sup>40</sup> it is clear that the treatment is not uniform.

Also in Colombia since 2016 the Law 1819 set in place a system to tax income on natural persons under a category where an “employee” can be consider anyone that fit certain parameters, not only those that have a labor contract,<sup>41</sup> which is problematic when faced with its international compromises and when regarded with an IPTS approach, because of the independent character of the service , because under this new regulation everyone can fit as an

<sup>40</sup> Here a public entity shows that services that are paid from outside of the territory are not subject to any withholding tax whatsoever. Anex 6. (<http://www.fontur.com.co/contratacion/invitacion-privada/10/529/2016/0>)

<sup>41</sup> Article 3 of the Law 1819 of 2016 (December 29) Oficial Diary Number. 50.101 de 29 od December 2016.

employee of someone even though the relationship is labeled as of an independent character.

IPTS in Colombia are still neglected to a secondary activity that does not have an adequate treatment. In the next chapter an analysis through certain case law will prove that it needs a better approach.

### **3. A casuistic approach to the problem of *Independent Personal Technical Service*.**

Problems are more than likely prone to appear, to tax payers and administrations, in the future regarding IPTS because the regulations set in the tools at the disposition of Tax payers and Tax Administrations lack the specialty to treat IPTS, the situations here studied will be took first, under the scope of Colombia's internal legislation second an analysis following the two MTC (UN Model and OECD Model) to find its qualification.

Case A:

The parties of this case are P&P Company located in Country Pep, all of the shareholders are located as well in Pep and R&R Company Located in Country Bib with all of its shareholders located in Bib, countries with a bilateral tax agreement in place.

On December 2017 1<sup>st</sup>, P&P Company and R&R Company signed a scouting agreement, under which R&R committed to render services regarding sports and technical monitoring of amateur players from different non- professional leagues located in Country A, with the purpose of advising P&P in future recruitments and acquisition of preferential rights to such players.

In the corresponding contract the parties agreed to an annual payment of \$500,000 USD for the provision of such services, throughout five subsequent years. On January 1<sup>st</sup>, 2017, P&P paid the first \$500,000 USD without any withholding tax.

First problem is what can be considered a IPTS and if the rendering of scouting Services can indeed be consider a technical activity, none of the sources studied here, gave a single approximation to the definition of IPTS but the Colombia's internal legislation, that just relies on



something as the “use of applied knowledge through the exercise of an art, craft or technique, without transfer of said knowledge”, the problem starts where it has to be decided if the scouting services are the use of applied knowledge or not, is watching football some applied knowledge, certainly no, is looking for players in amateur fields applied knowledge, it may be, but then the follow up is to determine if that definition would be exclusive to the field of the tax on income on individuals, rather than in companies as it happens to be the case, no certain answer can be enlighten from the state of the law, the case will resolve in saying that the payment from the technical service does not mean anything else but a business profits and will be treated with that differentiated rate, which will be as in the latest case a lazy and wrongful approximation.

Under an OECD Model the situation will revolve essentially in the fact that the income should be treated as business profits, making probable a solution under the same scope used in the precedent case.

And under a UN Model , the not so clear article 14 would lead us to believe that the income could very much indeed result taken as a Business profits, eroding the tax base on both sides of the situation, the situation will become even more complicated when confronting the new Article 12A, because it will lead us to an exercise of interpretation where the approach could come short in assuming where and how the tax should be levied.

The analysis of these situations is just a glance of the problem, the lack of certainty and willingness has proved problematic to countries especially those in the developing world because they see their rights diminished by the lack of effectiveness in international regulations, making the commerce of cross-border service a lose-lose situation.

#### **4. Propositions for a conscious and effective tax treatment of *Independent Personal Technical Service*.**

In contrast with the lack of treatment and deepness of the propositions there was a certain effort from the UN, prior to the newly UN Model just published, and some of the most relevant renowned authors in International Taxation that have treated the subject, to put the taxation of IPTS in order , to say the least.

First it should be said that the discussion of technical services at the core of the UN has been more immersive and in a way more extensive in the last couple of years than in past decade and the new UN Model is prove of that. Especially in its latest reunion the UN decided to approve certain changes regarding the fees for technical services.

Inevitably this subchapter will treat the report on the Fourteenth Session of the Committee Of Experts in International Cooperation in Tax Matters because and specifically the changes to the fees for technical services that find themselves represented in two reports from the UN, studied in that Reunion the E/C.18/2017/CRP.1 and the E/C.18/2016/CRP.1, there is more to it than those studies but those two treat the most significant advances in IPTS or Fees for Technical Services.

The first report, the E/C.18/2016/CRP.1, the Committee of Experts on International Cooperation in Tax Matters Seventh session decided that the incorporation of new article was crucial to the treatment of Technical Services, that article read as follows :

*“Article 16 - Fees for Technical Services*

- 1. Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*
- 2. However, notwithstanding the provisions of Article 14 and subject to the provisions of Articles 8, 16 and 17, fees for technical services arising in a Contracting State may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State, the tax so charged shall not exceed \_\_\_\_ percent of the gross amount of the fees [the percentage to be established through bilateral negotiations.*
- 3. The term “fees for technical services” as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is made:*

*(a) to an employee of the person making the payment; (b) for teaching in an educational institution or for teaching by an educational institution; or (c) by an individual for services for the personal use of an individual.*

*4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment situated in that other State, or performs in the other Contracting State independent personal services from a fixed base situated in that other State, and the fees for technical services are effectively connected with*

*a) such permanent establishment or fixed base, or b) business activities referred to in (c) of paragraph 1 of Article 7. In such cases the provisions of Article 7 or Article 14, as the case may be, shall apply.*

*5. For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the fees was incurred, and such fees are borne by the permanent establishment or fixed base.*

*6. For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State or a third State through a permanent establishment situated in that other State or the third State, or performs independent personal services through a fixed base situated in that other State or the third State and such fees are borne by that permanent establishment or fixed base.*

*7. Where, by reason of a special relationship between the payer and the beneficial owner of the fees for technical services or between both of them and some other*

*person, the amount of the fees, having regard to the services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.”<sup>42</sup>*

This first report treats the fundamentals of the new vision of IPTS at the sein of the UN however going further in this report will be pointless as it was re-taken by the E/C.18/2017/CRP.1 integrally and it was changed from an Article 16 to Article 12A.

Then the second report is the E/C.18/2017/CRP.1, that essentially works out around Article 12A, which will be a new provision of IPTS that essentially over take the work and wording of the proposed Article 16 of the Report E/C.18/2016/CRP.1 , that basically allows a “Contracting State to tax fees for certain technical services paid to a resident of the other Contracting State on a gross basis at a rate to be negotiated by the Contracting States” <sup>43</sup> That means that the Contracting State has the right to tax fees “for technical services if the fees are paid by a resident of that State or by a non-resident with a Permanent Establishment (...) it is not necessary for the technical services to be provided in that State” <sup>44</sup>. This change in treatment is indeed a big step forward understanding that the commission thought about it especially considering the role played by IPTS and big foreign enterprises in some territories.

Also as portrayed by the Committee “In general, the rules under Article 7, together with Article 5, and Article 14 of the United Nations Model Convention give limited scope for taxing income from” <sup>45</sup> IPTS and thus this unfolded in the lack of treatment that is set in place today. This paper explains why treating IPTS as Royalties under article 12 is misplaced, considering specially that

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<sup>42</sup> *Committee of Experts on International Cooperation in Tax Matters Fourteenth session " E/C.18/2016/CRP.1" New York, 3-6 April 2017 Issues related to the updating of the United Nations Model Double Taxation Convention between Developed and Developing Countries. pg. 2*

<sup>43</sup> *Committee of Experts on International Cooperation in Tax Matters Fourteenth session "E/C.18/2017/CRP.1" New York, 3-6 April 2017 Issues related to the updating of the United Nations Model Double Taxation Convention between Developed and Developing Countries. pg 2*

<sup>44</sup> *Ibid pg. 2*

<sup>45</sup> *Ibid pg.3*

Royalties are indeed a transfer of know-how and property and not a IPTS itself, the turnaround with Article 12A is also the fact that it does not require a threshold to be activated, as it was considered by the members of the Committee .

There are other problems solved with such proposition as it is the subject of profits within Multinational Enterprises, because IPTS are used for base erosion purposes, as in the following example : Company X in Country X , under the current propositions of the UN MTC, delivers IPTS to Company Y in Country Y , if Company X does not break the threshold to be taxed for such services in Country Y then Article 14 would not be applicable , and if for some reason Country X does not tax or has a low-tax rate for those kind of services , assuming that Company X had performed such services at a different price than the one at arm's length proposition , then that means that it would have shifted profits from Country Y to Country X in the operation, considering that the tax rate will be lower in Country X , those profits to Company Y would be treated as costs under the tax base for Company X in Country X those are the kind of situations that Article 12A envision to treat.

The proposition also covers a problem around the consensus of Nations, because essentially there is not a certain way to agree what are “fees for technical services” the proposition then gives an alternative to any country in order for them to change that expression for “fees for services”<sup>46</sup> which will only be delimited by some exceptions contained as well in the article<sup>47</sup>.

The introduction of Article 12A puts out a set of problems around IPTS given by the UN Model that will be proven in the practical field, even though certain concerns were raised regarding the free trade competence in between enterprises inside and outside of the Nations involved.

There is also an approach proposed by the most renowned authors as Prof. Dr. Brian J. Arnold and Prof. Dr. Andrés Baez .

Prof. Arnold have stated that the problems around IPTS are whether giving source country rights to tax fees for technical services is a good approach or not, Prof. Arnold have said that following

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<sup>46</sup> *Ibid pg.11*

<sup>47</sup> *Ibid pg.12*

the narrow resident country approach of the model the outcome of a proposition as such is incompatible but he also clarifies that a disposition in that manner is of such relevance that a lot of countries have implanted it under its DTC.

This is presented by Prof. Arnold here :

*“In theory, tax treaties should not allow source country taxation of fees for technical and other similar services unless those services are performed through a PE or fixed base in the source country or the non-resident service provider works in the source country for a significant period in the year. However, the increasing number of bilateral tax treaties with special provisions allowing source country taxation of such fees indicates that relying exclusively on theory is simply ignoring the problem. Both the OECD and UN Models should deal with the issue of source country taxation of fees for technical services. That said, it seems unlikely that, given its residence country focus, the OECD Model would recognize any increased source country taxing rights with regard to such fees beyond those granted in the alternative services PE rule.”<sup>48</sup>*

Prof. Arnold takes into some possible solutions from a MTC approach, ranging from either immersive propositions regarding the taxation of IPTS from the threshold requirement to a Fixed rate on Technical Services as a whole in the contrary he also clarifies the problems to those solutions.

Prof. Arnold propositions can be broke down to 5 alternatives to the current situation , first to allow “source country taxation of fees for technical services performed in the source country that exceed a threshold”<sup>49</sup> such taxation will have to be at fixed percentage negotiated by the parties, problem will be that there is not a definition of technical services and to impose a tax on them is necessary to know what are they; Second “authorizing the source country taxation of fees derived by a resident of one state from the performance of technical and other similar services in

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<sup>48</sup> Brian J. Arnold, *The Taxation of Income from Services under Tax Treaties: Cleaning Up the Mess. Bulletin for International Taxation*, 2011 (Volume 65), 2010. pg. 27

<sup>49</sup> *Ibid* pg.27

the other state in excess of a minimum threshold”<sup>50</sup> problem here will be similar to that of the first point in the extent that there is not a definition of Technical Services in place; As a third option he propose to revise the provisions under the articles dealing with income from services in general “to allow expanded source country taxation of all income from services”<sup>51</sup> reducing its threshold requirement ; Four he proposes a redefinition of services so they could fit in as Royalties, which would prove problematic when trying to define services as royalties and lastly he proposed that a “ radically different solution would be to deem a non-resident corporation to have a PE with regard to technical services provided to an associated company resident in the source country”<sup>52</sup> problem here will be when there are several companies working as a group where non-arm’s length rules apply, and to single handedly pick up enterprises that work in a such way that technical services alone could constitute a PE.

Prof. Arnold ultimately states that :

*“The source country interest in increased taxing rights with regard to fees for technical and other similar services might be satisfied in a variety of ways. Lowering the threshold for the taxation of business services generally to 90 or 120 days would give source countries increased taxing rights over all business services, including technical and similar services. A narrower approach would be to deal specifically with technical and similar services, although this would require a definition of the services covered.”* <sup>53</sup>

The proposition under Prof. Arnold met the same problem , definition of technical services and services as a whole, but the point is that those situations concerning the taxation on technical services are a major worry for source (developing) countries and because of that the shift in the MTC should be applied in order to allocate rights in the proper way.

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<sup>50</sup> Ibid pg.27

<sup>51</sup> Ibid pg. 27

<sup>52</sup> Ibid pg.27

<sup>53</sup> Ibid pg.39

Prof. Baéz in a 2015 Article<sup>54</sup> treats the proposition at the time of a new article<sup>55</sup> dealing with fees from technical services proposed in 2013 by the UN Committee of Experts in Tax Matters,

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<sup>54</sup> Andrés Baez-Moreno, *The Taxation of Technical Services under the United Nations Model Double Taxation Convention: A Rushed – Yet Appropriate – Proposal for (Developing) Countries?* *World Tax Journal*, 2015 (Volume 7) No. 3

<sup>55</sup> “Article XX – Payments for Technical Services

1. Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State who furnishes [in consideration of] those services may be taxed in that other State.
2. However, notwithstanding Article 14 [and subject to the provisions of Articles 8], such fees for technical services may also be taxed in the Contracting State in which the fees arise and according to the laws of that State, but if the beneficial owner of the fees is a resident of the other Contracting State the tax so charged shall not exceed \_\_\_\_ percent of the gross amount of the payments (the percentage to be established through bilateral negotiations).
3. The term “fees for technical services” as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is the reimbursement of actual expenses incurred by the person providing the service or is made to an employee, director or top-level managerial officer of the person making the payments.
4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the fees for technical services being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment situated in that other State, or performs in the other Contracting State independent personal services from a fixed base situated in that other State, and the technical services [in respect of which the fees are paid] are effectively connected with
  - a) such permanent establishment or fixed base, or
  - b) business activities referred to in (c) of paragraph 1 of Article 7.
 In such cases the provisions of Article 7 or Article 14, as the case may be, shall apply.
5. For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the fees was incurred, and such fees are borne by the permanent establishment or fixed base.
6. For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State or a third State through a permanent establishment situated in that State, or performs independent personal services through a fixed base situated in the other Contracting State or a third State and such fees are borne by that permanent establishment or fixed base.
7. Where by reason of a special relationship between the payer and the beneficial or between both of them and some other person, the amount of the fees for technical services, having regard to the technical services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.” *Ibid* pg.10



even if much have changed since then, the analysis and ending result of Prof. Baéz's work is relevant to highlight the worries and development of IPTS from an scholar point of view.

Prof. Baéz's work list a series of problems arising from the proposition at the time, again the lack of definition of Technical Services<sup>56</sup> is one of them, but not only that he pressures for the convenience or inconvenience of the introduction of a Service PE<sup>57</sup>, also the problem of taxing fees for technical services at a gross or net profits<sup>58</sup>, these and other problems are treated in Prof. Baéz's work.

There could be a paper dedicated to the analysis of all of Prof. Baéz work, but as he himself<sup>59</sup> proclaims at the end of the article is that a consolidated approach to a new proposition, taking into account all of its work could result in a much appropriate way to study it. The amended article proposed by Prof. Baéz reads as follows :

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<sup>56</sup> “Quite to the contrary, the definitional issues of technical services have been considered as a critical aspect since the introduction of a new separated provision was first considered. These problems are exacerbated by the fact that the existing treaties containing a separated provision (and the new UN proposal) do not simply refer to technical services but, rather, to technical, managerial and consultancy services. A host of issues arise to this respect: what is the difference between technical services and services in general? Is there any difference between technical, managerial and consultancy services? Why is the category of technical services used as a generic and later put on an equal footing with managerial and consultancy services? Instead of answering these and other questions in the abstract, the author will try to make it clear using the proposed new article and particularly its related Commentary.

The new paragraph defining the objective scope of the provision reads as follows: The extreme concision of this definition – it is more a list than a real definition – seems to have pushed the proposed Commentaries towards a detailed explanation of the services covered by the confusing expression. It seems that, between the three options initially presented to the Committee in 2012 in order to define technical and similar services – leaving the terms undefined, providing an inclusive definition or providing an exclusive definition of the concept – the first possibility was chosen for the final version of the provision. It was apparently the desire to exclude any relevance of domestic law which justified this approach. Whether this objective has been achieved is more than dubious. The term “payments for technical services” as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is the reimbursement of actual expenses incurred by the person providing the service or is made to an employee, director or top-level managerial officer of the person making the payments.” Ibid pg.23

<sup>57</sup> Ibid pg.8

<sup>58</sup> Ibid pg.16

<sup>59</sup> “This author strongly believes that the conclusions of an academic piece of work should not just be a condensed repetition of the arguments and outcomes of the research. The conclusions should rather provide the reader with a schematic overview of the points of arrival of the research and allow him –together with the summary – to decide whether or not the work merits its attention, guiding him, additionally, on where to find the reasoning that leads to a particular outcome. In short, the researcher writes the conclusions at the end of the work whereas the reader normally uses them as a starting point.” Ibid pg. 43

*“UN MODEL TAX CONVENTION Article XX – Fees for Technical Services*

*1. Fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.*

*2. However, notwithstanding Article 14 and [subject to the provisions of Articles 8], such fees for technical services may also be taxed in the Contracting State in which the fees arise and according to the laws of that State if the payments are made by or in the course of an enterprise but if the beneficial owner of the fees is a resident of the other Contracting State the tax so charged shall not exceed \_\_\_\_ percent of the gross amount of the fees (the percentage to be established through bilateral negotiations but preferably identical to the percentage established for royalties).*

*The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.*

*3. The term “fees for technical services” as used in this Article means any payment in consideration for any service of a managerial, technical or consultancy nature, unless the payment is the reimbursement of actual expenses incurred by the person providing the service or is made to an employee, director or top-level managerial officer of the person making the payments.*

*4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a PE situated in that other State, or performs in the other Contracting State independent personal services from a fixed base situated in that State, and the technical services [in respect of which the fees are paid] are effectively connected with*

*a) such permanent establishment or fixed base, or b) business activities referred to in (c) of paragraph 1 of Article 7. In such cases the provisions of Article 7 or Article 14, as the case may be, shall apply.*

*The provisions of this paragraph will not be applicable if the beneficial owner of the fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the fees for technical services arise through a permanent establishment of that other State according to the provisions of Article 5.3 (b) of this Convention. In such case the provisions of paragraphs 1, 2, 3, 5, 6 and 7 of this article shall apply.*

*5. For the purposes of this Article, subject to paragraph 6, fees for technical services shall be deemed to arise in a Contracting State if the payer is a resident of that State or if the person paying the fees, whether that person is a resident of a Contracting State or not, has in a Contracting State a permanent establishment or a fixed base in connection with which the obligation to pay the fees was incurred, and such fees are borne by the permanent establishment or fixed base.*

*Where, however, the services for which the fees are paid, are used or consumed in a State having a place-of-use rule, the payment would be deemed to arise in that State.*

*6. For the purposes of this Article, fees for technical services shall be deemed not to arise in a Contracting State if the payer is a resident of that State and carries on business in the other Contracting State or a third State through a permanent establishment situated in that State, or performs independent personal services through a fixed base situated in the other Contracting State or a third State and such fees are borne by that permanent establishment or fixed base.*

*7. Where by reason of a special relationship between the payer and the beneficial or between both of them and some other person, the amount of the fees for technical services, having regard to the technical services for which they are paid, exceeds the amount which would have been agreed upon by the payer and the*

*beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the fees shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.”<sup>60</sup>*

Prof. Baéz amended article proposes some interesting things for the time it was written, such as the allocation of rights in the source country, with a limited threshold, with a fixed rate on a gross basis , also it finally gives a definition that is somewhat complete on the term “fees for technical services” considering expenses as well.

As it has been shown the efforts in the doctrine and at the sein of the UN trace a path for IPTS in the basis of a better definition and the allocation of taxing rights in the source country.

### **5. The adequate path for *Independent Personal Technical Service* in context with its influence and problematics.**

In this work the issue the issue of IPTS has been extensively treated, its problems and solutions are yet far away from a consensus all in all but somehow the path is clear.

In our regard an introduction of a new Article 12A of the UN Model , which treats Fees for Technical Service, is not an immersive solution to a problem that could evolve more, even if the idea behind the introduction of the article is to extend a real definition to Technical Services , that as aforementioned is key to the treat IPTS and also grant allocation rights to the source country, left behind a threshold requirement that could be necessary.

The adequate path for IPTS would be an independent article under both models that would deal with the consequential allocation of rights in the Source Country , looking where the payments are borne this tied up as well with a solution to the definition of IPTS itself, because one of the pillars in this subject is to know and differentiate IPTS from all other types of service.

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<sup>60</sup> Andrés Baez-Moreno, *The Taxation of Technical Services under the United Nations Model Double Taxation Convention: A Rushed – Yet Appropriate – Proposal for (Developing) Countries?* World Tax Journal, 2015 (Volume 7) No. 3 pg. 44

Consequently it is necessary to incentivize a treatment of IPTS that allows a distinctive treatment from the income derived of royalties.

However the best solution is to focus on domestic legislation that can narrowly pin the definition of Services and Technical Services, looking for a common point of understanding, also allocating rights on the payments done by residents to non-residents, with an arm's length approach.

However the new propositions seems to leave the independent character of IPTS without a proper definition and application, problems could arise from that perspective in the regular extent of the article as it could stand.

There has to be recognition to the efforts of the UN, the introduction of a new article is indeed necessary and the way it is constructed can be detailed to actually work in situations where fees for technical services arise.

The approach took by the OECD is inevitably not enough and it seems lazy to actually be compliant with rules that do not treat the situation in specific and let a treatment roll under provisions that are not completely related with the matter in subject.

Under a Colombia's scope, the new provision of the UN Model 2017 bring to the light a problem that turn over the concerns of the next bilateral negotiations held by the administration regarding IPTS and technical services, the article 12A and the new DTCs yet-to-be approved do not seem to be going in the same direction as it is proven in the DTC in between Colombia and France that does not implement article 12A and it holds the same treatment under which the allocation of rights is given in some instance to the residence state and then to the source state if compelled by its internal legislation, as it stands the future will be uncertain for IPTS not only there will be conflicts under the characterization of Fees Technical Services and why they are different from IPTS and lastly what are the future of the already approved DTCs under Colombia's legislation, will they be following an approach thought the Clause of Most Favored Nation (countries such

as Spain, Switzerland, Chili, Canada, Portugal, The Czech Republic and Mexico have such clause in their agreement with Colombia<sup>61</sup>) and what about the new DTCs negotiated under the new state of the art that is the UN Model 2017, will Colombia's take that seemingly more simple approach or will they stood with the latest approach without the implementation of the new proposition.

## **Conclusions.**

Throughout the development of this document IPTS started as an obnoxious concept under an International Tax Scope, in the path to a clearer approach ITPS have been considered through a common understanding of the term that showed a concept that even if complex can pretty much indeed be understood with a logic individual study of the term but not only that the work with IPTS prove that a definition can even be extracted from some sources that are in the law and the aides of it, as the ISIC Rev 4.

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<sup>61</sup> Hernán Sánchez Castillo, Qualification of the terms of technical service, technical assistance and consulting in the multilateral taxing convention in Colombia , Revista de Derecho Fiscal No 12 • Enero-Junio de 2018, Universidad Externado De Colombia pg 40.

Finding a definition to the term even if put in our own words was the first and a key step to the work, in that manner the next step was to indeed see where IPTS stand in the Law itself and not just at an international level but also at a national level , IPTS then showed itself to be a subject that, maybe by the lack of political willingness or simply just by being a subject that not so often arrive to administrations around the world, was not properly controlled and legislated, even when looking at an international level it was not so clear for tax payers and administrations where to correctly classify IPTS, until very recently indeed with the introduction of Article 12A under the UN Model , but as shown the introduction of such article proposes a conflict with the current Article 14 and it will be down to the Countries negotiating their new treaties to come out with solutions to those sort of troubles.

However as studied the new UN Model does indeed a great work providing new definitions and new possible solutions problems arriving to Technical Services, but it leave wide open the spectrum to troubles through IPTS and therefore the problem has still a non-fully functional remedy.

As a consequence , it is right to affirm that an approach to IPTS that takes into consideration the transactions made in the real world is long overdue by the Models and Countries around the world, in addition the never ending growth of the digital economy will increase the need of having a more specialized international tax law.

The solution can be no other to somehow either implement a new Article 14 under both models following the path given by the new Article 12A, that is giving definitions to the subject that encompass the Article and clear approach to real-life situations where there is not unlawful leverage to any of the parties involved this will evolve into more transparent taxation, something that should be desired in any situation.

In the meantime the remedies set in place would keep engrossing the utilities of big companies and will continue to dismantle the tax rights of not so competitive countries that find themselves in the position of a source country.

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